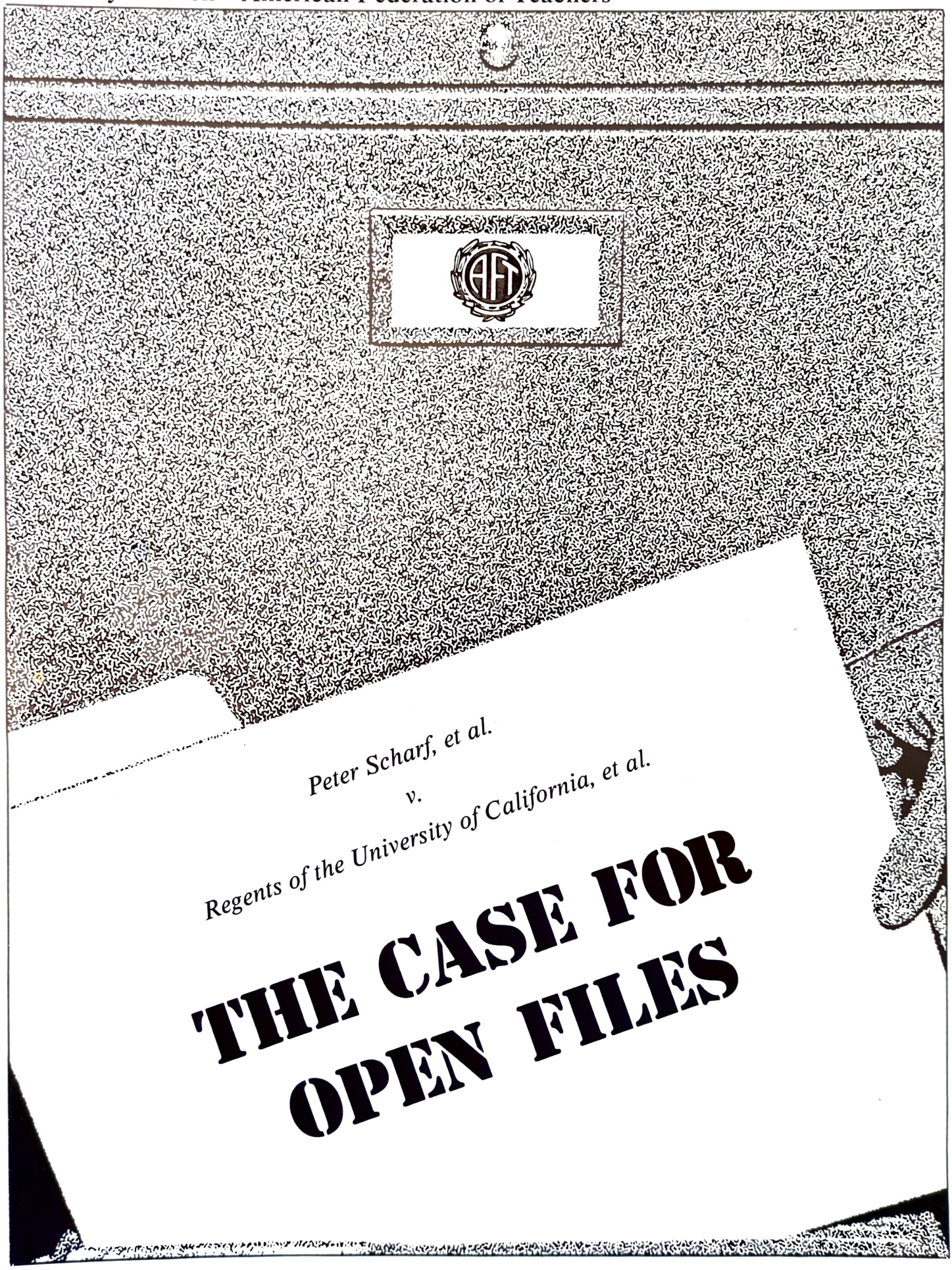
University Council – American Federation of Teachers



Peter Scharf, et al.

v.

Regents of the University of California, et al.

THE CASE FOR OPEN FILES

UNIVERSITY COUNCIL – AMERICAN FEDERATION OF TEACHERS
Representing Faculty, Librarians, and Academic Researchers of the University of California

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Local 2199

P.O. Box 2181
Del Mar, CA 92014
February 1, 1987

Dear Colleague:

If you've worked in the University of California for some time, you've probably heard of the open files case. If you're new to the system, this booklet may be your introduction to it. But whether you're a tenured full professor, new assistant professor, lecturer, researcher, or librarian, the open files case may significantly affect your career in the University of California. As such, we think you should know more about it.

Unfortunately, there hasn't been sufficient publicity about the case, much less serious debate about the merits of open files. The university has used its internal media to present its side of the case. And we've done the same among our members. But now we want to reach a broader constituency and present the case in greater detail.

This booklet provides background on the case, presents key excerpts from our brief, and describes the results we hope to achieve. We have published it to explain the issues underlying the case, to articulate the reasons for our position, and to raise funds to pay for the legal work that has already gone into preparing the suit and which will yet be required to see it through to resolution.

The open files case has important civil liberties implications. We are asserting rights for ourselves that the university steadfastly denies. If our suit is successful, it will not only abolish secrecy in faculty reviews in the University of California, but will set a precedent that will help do the same throughout academe in this country.

If after reading the following 8 pages you decide that you share our concerns, we hope you'll contribute to the Open Files Defense Fund. Any amount would be helpful. Your contribution is of course tax-deductible.

If you you have further questions about the case, please feel free to contact me at our statewide office (P.O. Box 2181, Del Mar, CA, 92014) or contact the president of your campus UC-AFT Local (see inside back cover).

Sincerely,

Thomas Dublin
Associate Professor of History,
UC-San Diego
President, UC-AFT

INTRODUCTION

The University Council-AFT is suing the University of California to pry open the system of secrecy in the tenure and promotion review process that deprives UC academics of fundamental constitutional rights. Filed in March, 1986, our suit, *Peter Scharf, et al., vs. Regents of the University of California, et al.*, is the first challenge on constitutional grounds to the university's secrecy in evaluating the performance of academic employees.

The university's current confidential review system dates from the McCarthy era. It was instituted in 1953 as a way of cloaking administrative investigations of the "disloyalty" of faculty members. Only later did it become an integral part of the university's formal system of personnel review for promotion and tenure. In the late 1970s, under pressure from the UC-AFT and the state legislature, the university modified its procedures to provide faculty under review with summaries of confidential documents such as outside letters, departmental recommendations, and the reports of review committees. These were cosmetic reforms, however, and no substitute for the full access needed to ensure due process.

The University of California has vigorously defended its practices, exploiting its prestige as a great institution. It has claimed that confidentiality is essential to maintaining the quality of its peer review system, and that the future greatness of the university would be threatened if it could not continue to review its faculty in secrecy. Our case demonstrates the fallacies of these arguments.

We show that other major public educational institutions, scholarly journals, and funding agencies have adopted open evaluation procedures without any adverse effects on quality. Furthermore, all other state employees in California, including faculty in the state university system, are legally protected from the inequities and discrimination that inevitably arise when reviews are conducted in secret.

Our case is based on constitutional grounds, however, not on questions of policy. We argue that the right of privacy granted in the California Constitution guarantees UC academics complete access to their personnel files. Furthermore, we contend that the due process rights of academic employees provided by the state constitution and by the Fourteenth Amendment are violated by denying them access to information that is vital to their interests.

The university's current confidential review system dates from the McCarthy era. It was instituted in 1953 as a way of cloaking administrative investigations of the "disloyalty" of faculty members.

The case we have brought against the secret review system has been nearly a decade in the making. The UC-AFT helped draft and lobby for the state legislation on open files enacted in 1978. At that time we argued solely for full access to the text of outside letters and of internal recommendations. The university, nonetheless, challenged this law in the courts, using its legal autonomy to protect its practices. These tactics required the UC-AFT to mount the constitutional challenge represented by our suit. For five years now we have been gathering evidence and preparing the brief that was submitted last spring.

In November 1986 we had our first hearing in California Superior Court in Oakland. The judge turned down the university's motion for a summary dismissal on the grounds that our brief made a *prima facie* case that the secret review system violated constitutional guarantees of privacy and due process. This ruling simply meant that the facts supporting our case would be heard and contested in a court trial, which we expect to take place early next fall.

Preparing our case has been expensive. We have spent $50,000 so far, and will probably spend another $50,000 before a decision is rendered. Loans and contributions from concerned faculty members, along with aid from

the California Federation of Teachers and the American Federation of Teachers, have enabled us to take the case as far as we have. Despite this aid we are deeply in debt. Our only recourse now is to broaden our base of financial support.

We are thus appealing to you to dig deep and contribute whatever you can to winning this important civil liberties case. We need your help to reduce our debts and to allow our attorney to argue the case effectively. The university relies on state and federal funds to send its army of laywers into the courts. We obviously do not have such vast resources to draw upon, hence our appeal to you.

On each campus we have one or two faculty members who have agreed to coordinate local fundraising. You can make a tax-deductible contribution to the *Open Files Defense Fund* through one of these people or you can send it directly to our statewide office (P.O. Box 2181, Del Mar, CA, 92014).

Your support is essential to winning this precedent-setting case. If we win, not only will UC faculty be ensured their rights to privacy and due process, but university faculty throughout the country will be a step closer to obtaining the same rights. A precedent in California will surely help erode similar practices elsewhere. So please give whatever you can to help us protect faculty rights--*your rights*--and the rights of academics everywhere in the United States.

The right of privacy granted in the California Constitution guarantees UC academics complete access to their personnel files. The due process rights of academic employees provided by the state constitution and by the Fourteenth Amendment are violated by denying them access to information that is vital to their interests.

THE BRIEF

The heart of our case is a 270-page brief filed in Oakland Superior Court. Rather than simply summarize the constitutional arguments, we think you'll find the brief itself compelling. We also think you'll see that the strength of the case merits your support.

In excerpting the following portions of the brief, much of the concrete evidence has been omitted. Citations have also been left out and minor emendations have been made for purposes of clarity. Copies of the complete brief are available at cost from the UC-AFT.

The Origins of Secrecy

We focus on the origins of the first written policies that required secrecy, the reasons articulated for those policies, and the development of those policies over the years. The material we have discovered presents strong, if not conclusive, evidence regarding the origins of the secrecy system. . . .

The first stirrings came in 1951 in a memorandum from R.S. Dingel, an administrative assistant to President Sproul. Dingel's letter showed that the university was considering revisions to the "instructions to appointment and promotion committees." Professor Robert Brode, chair, budget committee, northern section, had written to George E. Pettitt, another administrative assistant to President Sproul:

"As I mentioned in my talk to you yesterday morning, I am not authorized on the part of the budget committee to advise you how best to put into effect the regents' policy of non-appointment of communists, though I do personally believe that it is the responsibility of the department chairman to make himself aware of the activities and character of his department members, and to ascertain before recommending new appointments something of the character of the person proposed. His activity should be continuous and not initiated once in two years on the occasion when he recommends a promotion or advancement. He should report his information to his dean or the president in appropriate *confidential memoranda*." (emphasis added)

Administrative assistant Dingel wrote to President Sproul: "Professor Brode's proposal . . . would appear to provide much more effective means for maintaining the safeguard sought. As Brode points out, the department chairmen can be charged with responsibility for *continuing* checks on the loyalty of his staff members both present and prospective." (emphasis in original)

Three months later . . . an administrative assistant to the president wrote a four-page memorandum to President Sproul regarding "implementation of loyalty policies." Three months later, George Pettitt wrote another memorandum . . . in which he suggested that the same letter (regarding loyalty) being prepared by the administration for chairmen of departments be sent to appointment and promotion committees.

. . . in April, 1952, the president's office issued instructions to chairmen of departments and other administrative officers. These policies required chairmen and other administrative officers to engage in a "careful examination of the candidate's published writings" to see if they were communists. Any doubts as to the "qualifications of the individuals" were to be passed on to reviewing authorities.

The procedures that were announced in 1952 and 1954, however, were to differ from . . . previous procedures because they injected into the review process written instructions regarding secrecy. It is not until July 1, 1953, that the "instructions to appointment and promotion committees" issued by President Sproul first contained the following restriction: "The DELIBERATIONS, DECISIONS AND MEMBERSHIP OF THE REVIEW COMMITTEE ARE STRICTLY CONFIDENTIAL." This is the first appearance of [a] secrecy rule in a widely distributed instruction (to this date it remains intact, now appearing in *APM* 160). . . .

It is clear that the first rationale articulated for secrecy, other than to investigate the loyalty of faculty, was to insulate committee members from pressure by deans and members of the departments. In addition, standing committees were viewed as undesirable because they might "follow a line unsatisfactory to the administration." There was no

It is clear that the first rationale articulated for secrecy, other than to investigate the loyalty of faculty, was to insulate committee members from pressure by deans and members of the departments.

suggestion that secrecy from the candidate of evaluative writings was needed to ensure candid opinions or that reviewers would not serve as evaluators without secrecy.

. . . [as of 1954, UC policy required that] the deliberations, decisions and membership of review committees should be kept secret from administrative superiors at the department and college levels. Once again, there is no suggestion that secrecy from the candidate was needed to ensure candid reviews by peers. The thrust of the secrecy procedure was to insulate review committees from retaliation by department chairs and deans

The Issue of Academic Freedom

In recent years, universities have thrown up "academic freedom" as a barricade against a broad range of attempts to require them to obey the law. In so doing, they have attempted to tranform a valued protection of free thought into a wholesale insulation of academic administrative discretion. Academic freedom, as it is traditionally defined and has been judicially recognized, restricts both external government agencies and university authorities from interfering with the freedom of teachers to teach as they think best. The academic freedom claimed by the university administration is, at best, only distantly related to that concept.

. . . Petitioners do not seek any action on the part of the court which would suppress ideas or limit their dissemination. Instead, they merely seek to vindicate the constitutional rights of candidates for tenure and promotion by ensuring that they are allowed to check their personnel files and expose inaccu-

racy or prejudice and respond to criticisms. They seek, in fact, to vindicate the principles behind academic freedom: that truth emerges when ideas and opinions are freely discussed and rebutted. The remedy they propose will enhance academic freedom by reducing the possibility that tenure denial will be used to suppress ideas.

. . . The university's claim that it is entitled to extraordinary deference in this area must be rejected. Petitioners do not ask the court to second guess academic judgments or to interfere in any way with academic freedom. Instead, they merely ask that the university be required to respect their rights to privacy and due process and to ensure that decisions are based on the university's exercise of its expertise and not on bases that are discriminatory, arbitrary, or violative of the academic freedom of its faculty.

The Privacy Argument

Since 1974, the California Constitution has guaranteed every Californian an inalienable right to privacy. The legislative history of the constitutional amendment enacting this right, and the cases interpreting it, have made it clear that the amendment was adopted to protect the right of individuals to control the circulation of personal information compiled about them and to allow them to ensure and protect the accuracy of that information. The university's closed-files policy has effectively denied Petitioners any means of ensuring the accuracy of the information compiled about them. By denying Petitioners access to their complete tenure and promotion files, the university has denied them their constitutional right to privacy.

> Tenure and promotion files are, in essence, secret files that are used to determine a person's employment status and, in many cases, his or her entire academic future. Yet individals cannot effectively challenge the accuracy of the information these files contain.

The constitutional right to privacy was acknowledged by state and federal courts long before it was explicitly incorporated into the California Constitution. The United States Supreme Court has recognized a constitutional right to privacy grounded in a "penumbra" of rights guaranteed under the first, fourth, fifth, and ninth amendments. The California Supreme Court expanded on this federal right and, even before the enactment of the Privacy Amendment, recognized a far-reaching right of privacy, which protects "one's feelings and one's peace of mind."

The Privacy Amendment was thus adopted against a background which already provided significant protection against government intrusion into privacy and against forced disclosure of personal information. In adopting an amendment to the constitution guaranteeing the right of privacy, the people of California did not merely formalize these protections; instead, they significantly expanded and strengthened their protected privacy rights. While the courts had previously recognized a basic right to be free from government "snooping" and intrusion . . . the new amendment was intended both to protect a much broader range of activities, and, more specifically, to strengthen individuals' control over the information about them that governments (and other agencies) gather. Under the new amendment, moreover, privacy is to be "considered an inalienable right which may not be violated by anyone."

University tenure and promotion files are, in essence, secret files which will be used to determine an individual's employment status, and, in many cases, his or her entire academic future. Yet the individuals whose files they are have no effective means of checking their accuracy or of challenging, explaining, or correcting the information--and misinformation--contained in them. The danger presented by this situation was clearly contemplated when the Privacy Amendment was adopted. It was exactly circumstances of this kind, with their attendant "loss of control over the accuracy of . . . records," that the

amendment was intended to eliminate. It is clear that the amendment gives all individuals, including tenure candidates, the right to examine files about themselves maintained by public and private agencies and to ensure that the information contained in those files is accurate. Regardless of its constitutional status, the University of California, like any other agency, cannot deprive individuals of the rights guaranteed them by the state constitution.

The Privacy Rights of Reviewers

The arguments suggesting that the privacy interest of reviewers could outweigh those of candidates for tenure and promotion become especially weak when they are applied to deans, chancellors, administrators, and faculty committee members. Even assuming, *arguendo*, that an individual professor has a right to keep his or her identity secret when he or she comments on the fitness of a colleague for tenure or promotion, an administrator or committee member can have no comparable rights. Chancellors, deans, provosts, and CAP members, by the very nature of their positions, are required to evaluate the qualifications of faculty members, and to report on their decisions. Their identities are no secret from the candidates; only the content of their evaluation is concealed. There is therefore no reason to treat them as confidential sources of information or to offer them a cloak of secrecy so that they can do their jobs properly.

In *In re Dinnan*, the Fifth Circuit Court rejected a claim that a faculty member should not be required to reveal his vote in a tenure decision. The court noted that "society has no strong interest in encouraging timid faculty members to serve on tenure committees." It went on:

"If the decision-maker has acted for legitimate reasons, he has nothing to fear. . . . If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure . . . process. However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them."

> The idea that secrecy is essential for honest evaluation of scholarship is utterly foreign to the assumptions that underlie academic truthseeking. The vast majority of decisions affecting every important aspect of scholarship are necessarily made in an atmosphere of free and open debate.

The Fifth Circuit's statement applies with equal force here. It is no violation of the rights of a participant in the tenure process to require that he or she have the courage to account for his or her words or acts. Instead, such an accounting is necessary if the rights of the candidate are to be protected.

The privacy rights of the individuals who submit evaluations thus cannot outweigh the privacy rights of the candidates under review. The purpose of the Privacy Amendment and a tradition which recognizes an individual's special right of privacy as to his or her personnel file tip the balance sharply toward the candidate for tenure or promotion, whose entire career may well depend on the accuracy of the materials in his or her file.

In reality, there is little evidence, beyond the university's vehement assertions, that confidentiality has any correlation with academic excellence or successful peer review. The university has never produced, to our knowledge, a single statistically or methodologically sound research study that supports the proposition that confidentiality is an essential ingredient to effective peer review. The defenders of the present system have never tried an open access policy for the academic employees of the University of California. There is no empirical reason to believe that allowing that access would cause the dramatic changes in the peer review system or the reduction in honest judgments . . . which the university predicts.

The idea that secrecy is essential for honest evaluation of scholarship is, in fact, utterly foreign to the assumptions that underlie academic truthseeking. The vast majority of decisions affecting every important aspect of scholarship are necessarily made in an atmosphere of free and open debate. . . . In publishing the results of their research, professors regularly attack research of others in their field. In reviewing the research of others--in book reviews, journal articles, and classrooms--they regularly criticize the credibility, competence, skills, training, methods, and moral fiber of their colleagues. It is absurd to suppose that, when asked to afford tenure evaluations some measure of the same openness, academia will be seized with such an overwhelming fit of shyness that peer review will be crippled.

. . . Persons who agree to evaluate candidates for tenure and promotion do so voluntarily. In so doing, they assume the power to make or break the academic careers of their colleagues. It is hardly unreasonable to expect them to be accountable for the accuracy of their evaluations. Accountability does not expose evaluators to significant risk. . . .

It is possible that some reviewers will, on "principle," refuse to submit evaluations if they know candidates will have access to them. On the other hand, some reviewers currently refuse to participate in review processes which are kept secret from the candidates. There may also be reviewers who will not be honest, or who will temper their criticisms, in evaluations which they know candidates they review will see. On the other hand, there are currently unquestionably reviewers whose evaluations are not honest because they know they will not be accountable for them. Neither the principles nor the scruples of reviewers can justify the denial of the rights of those who are reviewed. An assertion that the system of peer review requires secrecy because, without it, the system will be sabotaged by its participants does not constitute proof of necessity. The preferences of reviewers that the text of their reviews be kept secret cannot justify the continuation of a system which abridges a fundamental right of reviewees.

The declarations of professors who write reviews under open systems demonstrate that disclosure does not inhibit candor, but rather improves the quality of reviews by forcing reviewers to think and write more carefully and to use purely objective criteria backed by factual documentation.

Full Access Will Strengthen Peer Review

There are several reasons to believe that eliminating the veil of secrecy from tenure and promotion proceedings would improve those proceedings and actually foster academic excellence. The observations of participants in the present system and researchers into peer systems, as well as the experience of other institutions . . . indicate that the present system has significant flaws which could be eradicated if persons under review were given access to their files.

Studies of peer review systems . . . have concluded that such systems, while generally useful, are susceptible to a number of abuses. [Much of the disagreement evident among different reviewers is due primarily] to factors evidencing human fallibility, including differences in the level of competence of reviewers, lack of clarity about the expected scope of the review, differences in the amount of time and attention reviewers are willing to devote to the evaluation process, and bias of reviewers in favor of researchers who use methods like their own. . . . The effects of many of these flaws can be reduced dramatically, however, if they are identified and rebutted before they can skew a final decision. Such neutralization can occur only if the person under review him or herself . . . is allowed to see peer evaluations before a final decision is made. Thus the university's interest in using the peer review system effectively to evaluate the quality of a candidate's work is *served* if candidates are allowed access to reviews of that work.

The criticisms of peer review procedures described in the studies discussed above are reflected in the experience of participants in the tenure and promotion process at the University of California. . . . The declarations of numerous professors who have evaluated candidates, served on ad hoc committees, and inspected secret files indicate that, under closed file peer review systems unsupported statements abound in evaluations, that evaluations are submitted by persons with little expertise in the candidate's field of study, that uncorrected factual mistakes and false rumors remain in personnel files and contribute to decisions to deny promotion and tenure, that ad hoc committees are stacked to ensure foreordained results, and that other abuses are allowed to taint the peer review process.

Peer Review Without Confidentiality

Confidentiality . . . is by no means universal among major research universities. The University of Wisconsin . . . gives candidates for tenure or promotion access to all documents generated inside the university and, in many departments, copies of signed outside evaluations. . . . The University of Colorado follows similar procedures. An Oregon state statute requires that all academic employment records, including letters solicited in support of tenure and promotion, be open, and the University of Oregon therefore has completely open files. The state university system in California . . . is required by Education Code Section 89546 to allow professors complete access to their files.

A number of peer review systems in which professors regularly participate provide persons under review with at least the verbatim texts . . . of evaluations. The National Endowment for the Humanities, the National Science Foundation, and a number of refereed journals follow this practice. The declarations of professors who write reviews under this system demonstrate that disclosure does not inhibit candor, but rather improves the quality of reviews by forcing reviewers "to think and write more carefully" and "to use purely objective criteria backed by factual documentation."

If a labor union told its members that they could be expelled or fined for disclosing evidence of racial bias, society (and the courts) would never tolerate it. Yet the university has enforced secrecy through coercive means for many years.

It is thus clear that open access to personnel files, letters of recommendation, and reports of intra-university administrators does not disable the peer review system, jeopardize academic excellence, or handicap the university's ability to solicit frankly critical evaluations. What is does, however, is to insure that criticisms are based on fact and observation rather than on feelings and rumors.

Inequities in the Present System

One of the oddest incongruities of the current promotion and tenure system is that it declares as "unethical" and "unacceptable conduct" disclosure of "confidential material," regardless of whether the material establishes bias or procedural irregularity. A university is supposed to be an institution built upon the search for truth. Yet, truth as a value is less weighty than secrecy.

UC's faculty code of conduct enforces secrecy by stating that breach of confidentiality may lead to censure, suspension, demotion, or dismissal. If a labor union told its members that they could be expelled or fined for disclosing evidence of racial bias, society (and the courts) would never tolerate it. Yet the university has enforced secrecy through coercive means for years.

. . . The university has argued that the presentation of written summaries of the "confidential evaluations" are adequate to provide faculty members protection against abuses, and that the deletion of names and text encourages candor. . . . Here we assert

that the summary process . . . does not comport with minimal notions of due process and fair procedure. [The comprehensive summaries are particularly unreliable. They] are often prepared by non-academicians . . . who may have little, if any, understanding of the subjects they are summarizing. . . . A report by the Berkeley division of the academic senate issued in September, 1979, stated [that the summaries] "are often quite inadequate for the purpose of a fair hearing: they take statements out of their context, lump together judgments that do not all have the same authority, and throw little light on the procedures that were followed. For the same reasons, they may mislead a grievant sometimes because they fail to disclose genuine improprieties, often because they may arouse suspicion that would appear groundless upon a closer examination of the record."

REFORM

The preceding text represents a small portion of the UC-AFT brief. As we hope you will agree, we feel the brief makes a solid case for the privacy and property rights of UC faculty to complete access to the material that is currently kept confidential throughout the review process.

How will you and your colleagues gain if we win our case? Obviously, it is difficult to predict exactly what the courts will require should they find the university's current practices unconstitutional. Although the court is not bound to follow our recommendations, we can nonetheless outline what we hope to achieve with our suit.

First, we seek the full texts of outside letters and of all recommendations made beyond the departmental level. We seek these materials in a timely fashion so that faculty members under review can respond to comments and criticism and make corrections before a final decision is reached. We also seek the names of outside reviewers and of members of the ad hoc committee to permit candidates to address the qualifications of reviewers as well as their possible biases. Finally, we call for a drastic overhaul of current appeals procedures through the committee on privilege and tenure, so that the scope of appeals will be broader and the authority of the academic senate in the review process will be increased.

To some, these reforms may seem untested and therefore threatening. But while they are new for the University of California, they are common in a number of first-rate research universities. The Universities of Oregon, Colorado, and Wisconsin all provide complete access to academics under review; and the state of North Carolina recently passed legislation mandating open files for their university system. Faculty and administrators at these universities have provided the UC-AFT with declarations attesting to improvements in outside letters and in the overall evaluation process that have accompanied these reforms in the system of peer review. Rather than viewing these changes as a threat to current UC standards, we see them as promising to strengthen peer review by safeguarding individuals' rights.

Taken together, these reforms address the constitutional arguments made in our suit and ensure that the constitutional rights of academics are respected. We hope that you share our concern for securing these rights and that you will lend financial support to our efforts. Please contact one of the fundraising coordinators on your campus, or contact us directly through our statewide office, and make a contribution to this important effort.

These reforms address the constitutional arguments made in our suit and ensure that the constitutional rights of academics are respected. These changes would not threaten current UC standards, but would raise them by promoting more objective reviews and by safeguarding individuals' rights.

1986-87 UC-AFT Local Presidents

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